

SOAH DOCKET NO. 458-09-0600

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Protestant and Petitioner	§	
&	§	
HARKER HEIGHTS POLICE	§	
DEPARTMENT	§	
AND KILLEEN POLICE DEPARTMENT,	§	
Protestants	§	OF
	§	
VS.	§	
	§	
ORIGINAL APPLICATION OF SCARLET	§	
IBIS, LLC	§	
D/B/A CLUB SEDUCTION,	§	
Respondent	§	ADMINISTRATIVE HEARINGS
(TABC CASE NO. 579765)		

PROPOSAL FOR DECISION

Scarlet Ibis, LLC, d/b/a Club Seduction (Applicant) has applied to the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises located at 201 Veteran's Memorial Blvd., Harker Heights, Bell County, Texas. The Commission's staff (Staff) and Harker Heights Police Department filed a protest to the issuance of the permits based on general welfare, health, peace, moral, and safety concerns.¹

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that the application for permits should be denied.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

¹ Killeen Police Department was included in the style of the notice of hearing, but did not file a protest letter.

On November 12, 2008, a public hearing was convened on this matter in Waco, Texas, before Administrative Law Judge John H. Beeler. The Applicant was represented by co-owner Marvin McCall. Staff was represented by Judith Kennison, attorney. Harker Heights Police Department was represented by Chief of Police Michael Gentry. The hearing concluded and the record closed that same day.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

Protestants challenge the application on the basis of § 11.46(a)(8) of the Texas Alcoholic Beverage Code, which provides that the commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that:

the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency.

In a protest hearing, the burden is on the protestants to show by a preponderance of the evidence that the permit(s) should not be issued.

B. Arguments and Evidence

1. Protestants' Case

The Protestants oppose issuance of the permits because of their belief that the premises will be controlled by members of the Gangster Disciples, a gang with a presence in the area. Several witnesses testified in support of this allegation.

a. Agent Daniel Garcia

TABC Agent Daniel Garcia testified concerning problems occurring at another club, Club Xecutive. According to his information, members of the Gangster Disciples are employed there and use the premises for gang activity. A review of the application for permits at issue in this hearing revealed that a gang member and former employee of Club Xecutive, Kendric Chester, was listed as one of the applicants. Agent Garcia is familiar with the criminal activity at Club Xecutive and police responses to the location, both of which are extensive and frequently involve violence.

Agent Garcia also stated that he had received information from informants that the Gangster Disciples planned to relocate to Club Seduction after it is open. This concerns him because Club Xecutive is so dangerous that he will not even perform a routine inspection there without backup officers.

For all of these reasons, Protestants argue that it will be detrimental to the community's health, safety, and welfare if the permits are granted in this case.

b. Detective Robin Talley

Detective Robin Talley testified that she is employed by the Killeen Police Department and is a former gang unit investigator. She is very familiar with Club Xecutive and knows it to be controlled by the Gangster Disciples. Her informants relayed to her that the older members of the Gangster Disciples thought that Club Xecutive was getting too much attention from the police and that they were planning to relocate to Club Seduction.

Detective Talley also remembered seeing Marvin McAll, Applicant's representative at the hearing, inside Club Xecutive at a time that it was not open for business.

c. Detective John Bowman

Detective Bowman is familiar with Club Xecutive and the criminal activity that occurs there. Historically, gang members place their members as bouncers at clubs they want to control. As bouncers, the gang members can control who has access to the premises. Applicant Marvin McCall worked as a bouncer at Club Xecutive.

Detective Bowman further testified that his gang member informants told him that Club Xecutive was experiencing too much police activity and that operations were to be moved to Club Seduction because it would be located in a city with a much smaller police force.

d. Lieutenant Erich Morsbach

Lieutenant Morsbach is employed as a supervisor with the Killeen Police Department. He testified that Club Xecutive has been a drain on his department and is a dangerous location. He is also aware that the club is a gang hangout and he has not received much cooperation from the management when attempting to alleviate criminal activity there.

e. Michael Gentry

Mr. Gentry is the Chief of Police for the Harker Heights Police Department and filed the protest against Club Seduction. He did so after noticing that one of the applicants had been affiliated with Club Xecutive. He is aware that the Gangster Disciples frequent that club and has had experiences dealing with the Gangster Disciples, including a double murder.

Chief Gentry further testified that Harker Heights is a small city with only about eight police officers on patrol on most evenings. He fears that the criminal activity at Club Seduction would take too many of his officers away from other needed duties.

2. Applicant's Case

Marvin McCall testified for Applicant. He stated that Mr. Chester, an individual listed as one of the applicants, was not working for Club Xecutive when the event's described by Protestants' witnesses occurred. He further stated that Mr. Chester would voluntary remove himself from the application

C. Analysis

After considering the evidence, the ALJ concludes that the permits should be denied. The evidence clearly established that Club Xecutive is presently controlled by a gang, the Gangster Disciples, and criminal activity regularly occurs there. It is also clear that gang activity of Club Xecutive will move to Club Seduction if the permits are granted. Further, although Applicant states that Mr. Chester is willing to remove his name from the application, at this time, he is still one of the applicants, and the ALJ can only consider the application as is exists at the time of the hearing.

Based on the above, the ALJ concludes that the place or manner in which the Applicant is expected to conduct business warrants the refusal of the requested permits based on the general welfare, peace, morals, and safety of the people, and on the public sense of decency.

V. FINDINGS OF FACT

1. Scarlet Ibis, LLC, d/b/a Club Seduction (Applicant) has applied to the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises located at 201 Veteran Memorial Blvd., Harker Heights, Bell County, Texas.
2. The Commission's staff (Staff) and Harker Heights Police Department filed a protest to the issuance of the permits based on general welfare, health, peace, moral, and safety concerns.
3. On October 21, 2008, the Commission's Staff issued a notice of hearing informing the parties of the time, date, and location of the hearing on the application; the applicable rules and statutes involved; and a short, plain statement of the matters asserted.
4. On November 12, 2008, a public hearing was convened on this matter in Waco, Texas, before Administrative Law Judge John H. Beeler. The Applicant was represented by Marvin McCall. Staff and Protestants were represented by Judith Kennison, attorney. The hearing concluded and the record closed that same day.

5. A licensed premises, Club Xecutive, is controlled by a gang, the Gangster Disciples, and is a frequent scene of criminal activity.
6. If Club Seduction is granted permits, the gang activity of Club Xecutive will relocate there.
7. If the permits are granted to Club Seduction, it will be operated in a manner incompatible with the general welfare, peace, morals, and safety of the people and on the public sense of decency.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapters 1 and 5 and §§ 6.01, 11.41, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings of fact, a preponderance of the evidence shows that issuance of the requested permits will adversely affect the safety of the public, the general welfare, peace, or morals of the people, and violate the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
5. Based on the foregoing findings and conclusions, the application of Scarlet Ibis, LLC, d/b/a Club Seduction for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit should be denied.

SIGNED January 12, 2009.

JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS